IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1459 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJKOT MUNICIPAL CORPORATION

Versus

RAMA RAVA HARIJAN

Appearance:

1. Special Civil Application No. 1459 of 1992

MR BP TANNA for Petitioner No. 1

MR PV HATHI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 10/09/2004

ORAL JUDGEMENT

By way of this petition under Article 227 of the Constitution of India, the petitioner Corporation has

challenged the legality, validity and propriety of the award March 11, 1991 made by the Labour Court, Rajkot in Reference (LCR) No. 831 of 1987 wherein the labour court has, while setting aside the order of dismissal of the workman, granted reinstatement with continuity of service will full back wages for the intervening period.

2. This Court has, while admitting the petition by issuing rule therein, has stayed the award in so far as it relates to back wages by order dated 18.11.1992. Thus, no interim relief was granted by this Court against the directions of the labour court as regards reinstatement of the workman. In view of that, the workman was reinstated in service during the pendency of the petition. Learned advocate Mr. Cariel appearing for Mr. Tanna for the petitioner has submitted that after the reinstatement of the respondent, he had again remained absent and his services were terminated and the said termination has not been challenged by the respondent. In view of this subsequent development, now, this court has to consider the question of back wages alone as submitted by the learned advocate Mr. Cariel.

As per the statement of claim filed by the workman before the labour court, he was working as Safai Kamdar in Ward NO. 14 since more than 17 years. As he had fallen sick, he had remained absent in November, 1984; he was admitted in Government Civil Hospital as indoor patient on 27thNovember, 1984; he was in hospital upto 21st December, 1984 and, thereafter, he submitted leave application accompanied by medical certificate but the respondent was not allowed by the corporation to join the service. Thereafter, the respondent had requested for extension of leave but that has also not been granted and ultimately, he raised industrial dispute before the conciliation officer. The respondent had produced medical certificate at Exh. 24, 25 and 26 before the labour court. Show cause notice dated 5.7.1983 was also produced before the labour court which was replied by the workman. Show cause notice dated 26th December, 1983 and reply thereto was also produced by the workman. The workman was examined before the labour court at Exh. 23. On behalf of the corporation, one Mr. Shamjibhai Jivrambhai was examined at Exh. 34 before the labour court. Another witness for the corporation namely Shri Jentilal Kalyanjibhai was examined at Exh. 35 before the labour court. Thereafter, the labour court examined the merits of the matter. Considering the issuance of the notice under section 56(2) of the Bombay Provincial Municipal Corporations Act by the petitioner corporation to the workman which was served upon the workman, the

labour court has not believed the defence of the corporation that the workman has left the job in its own and it is a case of abandonment of job. The labour court was of the view that if the defence of the corporation would have been correct, then, there would have been no necessity for the corporation to issue the show cause notice to the workman under section 56(2) of the B.P.M.C. Act. It is an undisputed fact that no departmental inquiry was initiated against the workman. Ultimately dispute was raised by the workman on 18th November, 1986. Considering the fact that the order of dismissal has been passed by the corporation against the workman without following procedure, without giving reasonable opportunity, the labour court set it aside and ordered for reinstatement of the workman.

Learned advocate Mr. Hathi appearing for the workman has submitted that as per the interim order made by this Court on 18th January, 1993, 50 per cent of the amount of back wages has been paid to the workman and now, 50 per cent back wages is remaining to be paid.

Learned advocate Mr. Cariel appearing for the petitioner submits that the labour court has erred in granting reinstatement to the workman with full back wages. He submits that the workman was voluntarily not reporting for duty and he had remained absent without prior permission of the authority concerned and, therefore, in these circumstances, grant of back wages would amount to giving a premium and, therefore, award as regards back wages is required to be set aside. He also submits that considering the subsequent development, namely, that the workman had, after his reinstatement, once again remained absent unauthorizedly and therefore, his services were terminated which is not challenged by him, this court should interfere with the award in question qua back wages. Alternatively, it was his submission that the amount of back wages paid to the workman as per interim order dated 18.1.1993 may be considered as full and final payment towards back wages by modifying the award in question. Except these submissions, no other submissions were made by Mr. Cariel on behalf of the petitioner.

As against that, it was submitted by Shri Hathi, the learned Advocate that the labour court was right in granting the reinstatement with full back wages. He also submitted that the labour court was right in not believing the defence of the corporation that the workman has left the job in its own and it is a case of abandonment of job considering the issuance of the notice

under section 56(2) of the Bombay Provincial Municipal Corporations Act by the petitioner corporation to the workman which was served upon the workman. He submits that once order of dismissal is set aside by the labour court on the ground that the order was passed without following due process of law and without holding departmental enquiry, then, the workman is entitled for relief of back wages as a normal consequence unless it is proved by the employer that the workman has been gainfully employed elsewhere. He submits that since the gainful employment of the workman was not proved by the corporation in this case, the labour court was justified in granting full back wages considering the fact that the workman had remained unemployed during the intervening period. He further submits that not only one but three show cause notices issued by the corporation were served upon the workman for remaining absent without prior leave but no departmental inquiry was initiated against the workman, before passing the impugned order of dismissal and, therefore, the order of dismissal was rightly set aside by the labour court as contrary to the provisions of the ID Act as well as the natural justice.

I have considered the impugned award made by the labour court. I have also considered the submissions made by the learned advocates for the parties. As per the order passed by this Court while admitting the petition wherein no stay was granted by this court against the award of reinstatement of the workman, the petitioner reinstated the workman in service. I have also perused the interim order dated January 18, 1993 passed by this Court (Coram : A.P. Ravani & J.M. Panchal,JJ). This Court has, after considering the ad.interim dated November 18, 1992, passed the following order on January 18, 1993:

"In this petition, rule has already been issued as per order dated November 18, 1992. Today the learned counsels appearing for the parties have been heard as regards interim relief. It is an admitted position that the direction given by the labour court as regards reinstatement of the workman in service has been complied with and the workman has in fact been reinstated. Therefore, the direction as regards reinstatement is not required to be disturbed. The Labour Court has held that the services of the respondent workman were brought to an end without holding inquiry. The labour court has directed that the workman be reinstated in service with full backwages from December 28, 1984.

Having regard to the overall facts and circumstances of the case we find it proper that the direction with regard to payment of full backwages should not be stayed in its entirety and without imposing certain terms and conditions. In facts of the case it is directed that the petitioner corporation will be at liberty to withhold 50% of the amount of backwages on condition that in case the petitioner loses in the petition it shall make payment of 50% of the amount of backwages on condition that in case the petitioner loses in the petition it shall make payment of 50% of the amount of back wages or any other amount as maybe directed by the Court with 12% interest. Interest shall be calculated from the date of the award. As regards balance of 50 % of the back wages is concerned, no stay is granted and it is directed that the same shall be paid to the respondent workman latest by February 8, 1993. If this amount is not paid by February 8, 1993, it shall carry interest at the rate of 18 % per annum from the date of this order i.e. January 18, 1993 till the payment is made. Interim relief is granted in the aforesaid terms."

Thus, as per the aforesaid interim order of this Court dated January 18, 1993, 50% of the backwages were withheld on condition that in case the petitioner loses in the petition it shall make payment of 50% of the amount of back wages or any other amount as may be directed by the Court with 12% interest and interest shall be calculated from the date of the award. As regards balance of 50 % of the back wages is concerned, it was directed that the same shall be paid to the respondent workman latest by February 8, 1993 and it was also ordered that if the said amount is not paid by February 8, 1993, it shall carry interest at the rate of 18 % per annum from the date of this order i.e. January 18, 1993 till the payment is made.

Considering the facts, it appears that the workman had remained absent on medical ground by producing necessary medical certificates before the Corporation and yet the order of dismissal was passed by the Corporation without holding any departmental inquiry though initially three show cause notices were issued by it against the workman. If the defence of the corporation is believed that the workman had abandoned the job, then it was not necessary for the Corporation to

issue notice to the workman under section 56(2) of the B.P.M.C.Act. Though three show cause notices were issued by the Corporation, no further steps were thereafter taken by the Corporation for holding departmental inquiry against the workman concerned and, therefore, considering that aspect of the matter, as per my opinion, the labour court was justified in setting aside the order of dismissal on the ground that it is violative of the principles of natural justice and in doing so, no error has been committed by the labour court.

As regards the award of back wages, I am of the opinion that the subsequent event or development after reinstatement of the workman cannot be taken into consideration for examining the award of back wages. After his reinstatement pursuant to the ad.interim order of this Court dated November 18, 1992, the workman had remained absent again and he was again removed from service as contended by the learned advocate Mr. Cariel for the petitioner. That subsequent alleged misconduct cannot be taken into consideration by this Court while examining the validity of the award of reinstatement made by the labour court. Therefore, the submission made in that regard by the learned advocate Mr. Cariel cannot be accepted and the same is rejected.

As regards back wages for the interim period, it was deposed by the workman before the labour court that he remained unemployed and the corporation has not proved his gainful employment. Once dismissal is found to be illegal and contrary to the principles of natural justice, ordinarily, workman is entitled for full back wages for the interim period and, therefore, the labour court was right in granting back wages to the workman. The contention raised by Mr.Cariel that in view of delay of three years on the part of the workman in raising of an industrial dispute, labour court was not justified in granting back wages cannot be accepted on the ground that it was deposed by the workman before the labour court that he raised the industrial dispute on 18.11.1986 which was referred to for adjudication on 18.5.1987. It was also deposed by the workman that since he was making request before the authority of the corporation to allow him to join the duties, that has consumed some time and since his requests were not considered by the corporation, he raised the industrial dispute. The reason given by the workman for not immediately raising the industrial dispute was not controverted by the corporation before the labour court, therefore, considering this fact, when the corporation has not been able to prove the gainful employment of the workman

during the intervening period and when the corporation has not been able to controvert the contention of the workman as regards delay in raising of an industrial dispute, according to my opinion, the labour court was right in accepting that plea of the workman and was right in granting full back wages to the workman for the intervening period. In this regard, I have considered the decision of the apex court in M/S HINDUSTAN TIN WORKS PVT. LTD. V. THE EMPLOYEES OF M/S HINDUSTAN TIN WORKS PVT. LTD. AND OTHERS, AIR 1979 SC 75. The apex court observed as under in para 9 of the judgment:

"It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was

> gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer trminates the service illegally and the termination is motivated as in this case, viz., to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P.Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the apex Court and now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in Dhari Gram Panchayat V. Safai Kamdar Mandal, (1971) 1 Lab LJ 508 and a Division Bench of the Allahabad High Court in Postal Seals Industrial Co-operative Society Ltd. V. Labour Court, Lucknow, (1971) 1 Lab LJ 327 have taken this view and we are of the opinion that the view taken therein is correct."

In view of these facts, according to my opinion, once order of dismissal is found to be illegal and contrary to the principles of natural justice, and also considering the fact that the workman had remained absent because of his sickness supported by medical evidence produced by him before the corporation and also

considering the fact that the genuineness of such certificates was not challenged by the corporation, I am of the opinion that the labour court was right in granting reinstatement.

This aspect, Whether such proved misconduct of remaining absent would require the extreme and harsh punishment of dismissal or not, has been examined by the apex court in Union of India and others v. Giriraj Sharma [AIR 1994 SC 215]; Syed Zaheer Hussain v. Union of India and others [AIR 1999 SC 3367] and recently in case of police constable in Shri Bhagwanlal Arya versus Commissioner of Police, Delhi and others [2004 SCC (L & S) 661], identical issue was examined by the apex court. The apex court held that the dismissal on the ground of alleged misconduct of such absence from duty is excessive and disproportionate and not permissible under the relevant provisions of the service rules. In that case, the police constable was absent from duty for two months, 7 days and 17 hours on medical ground. These facts are almost similar to the facts of this case. In Shri Bhagwan Lal Arya (supra), the apex court has observed as under in para 12, 13 and 14:

"12. The disciplinary authority without caring to examine the medical aspect of the absence awarded to him punishment of removal from service since their earlier order of termination of the appellant's service under the Temporary Service Rules did not materialize. No reasonable disciplinary authority would term absence on medical grounds with proper medical certificates from government doctors as grave misconduct in terms of the Delhi Police (Punishment and Appeal) Rules, 1980. Non application of mind by quasi judicial authorities can be seen in this case. The very fact that the respondents have asked the appellant for re-medical clearly establishes that they had received the applicant's application with medical certificate. This can never be termed as wilful absence without any information to competent authority and can never be termed as grave misconduct.

13. In B.C. Chaturvedi v. Union of India [(1995) 6 SCC 749:1996 SCC (L&S) 80:(1996) 32 ATC 44: AIR 1996 SC 484] (three Judge Bench, the question posed for consideration was as to whether the High COurt/Tribunal can direct the authorities to reconsider punishment with cogent reasons in support thereof or reconsider

themselves to shorten the litigation. In this case, at para 18, this Court has observed as under :(SCC p.762)

'18. A review of the above legal position would establish that the disciplinary authority and on appeal the appellate authority, being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High COurt/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.'

14. Thus, present one is a case wherein we are satisfied that the punishment of removal from service imposed on the appellant is not only highly excessive and disproportionate but is also one which was not permissible to be imposed as per the Service Rules. Ordinarily we would have set aside the punishment and sent the matter back to the disciplinary authority for passing the order of punishment afresh in accordance with law and consistently with the principles laid down in the judgment. However, that would further lengthen the life of litigation. In view of the time already lost, we deem it proper to set aside the punishment of removal from service and instead direct the appellant to be reinstated in service subject to the condition that the period during which the appellant remained absent from duty and the period calculated up to the date on which the appellant reports back to duty pursuant to this judgment shall not be counted as a period spent on duty. The appellant shall not be entitled to any service benefits for this period. Looking at the nature of partial relief allowed hereby to the appellant, it is now not necessary to pass any order of punishment in the

> departmental proceedings in lieu of the punishment of removal from service which has been set aside. The appellant must report on duty within a period of six weeks from today, to take benefit of this judgment."

Perusal of the judgment of the apex court makes it clear that the order of dismissal for proved misconduct of remaining absent was considered to be harsh and excessive by the apex court. In this case, such alleged misconduct was not proved by the corporation by holding departmental inquiry against the workman and without proving such misconduct, extremely harsh punishment of dismissal was imposed and, therefore, according to my opinion, the labour court was justified in granting reinstatement with full back wages considering the evidence on record and the labour court has not committed any error in making such an award.

No error apparent on the face of the record has been pointed out by the learned advocate Mr. Cariel. No infirmity and/or procedural irregularity has been pointed out by the learned advocate Mr. Cariel. This Court is having very limited powers while exercising the jurisdiction under Article 227 of the Constitution of India and, therefore, cannot act as an appellate authority and cannot reappreciate the evidence appreciated by the labour court since it has not been successfully pointed out that the findings given by the labour court are perverse or contrary to the facts on record. Therefore, according to my opinion, the labour court has not committed any irregularity and, therefore, award made by the labour court does not call for interference of this Court in exercise of the powers under Article 227 of the Constitution of India. However, considering the fact that the petitioner is a public body, condition imposed by this court while passing interim order dated 18.1.1993 that in case the petitioner loses in the petition it shall make payment of 50% of the amount of back wages or any other amount as maybe directed by the Court with 12% interest is required to be relaxed by clarifying that the petitioner will make payment of the remaining 50 per cent of the amount of back wages without any interest.

In view of the above discussion, there is no substance in this petition. Hence this petition is dismissed. Rule is discharged. There is no order as to costs. Interim relief granted earlier shall stand vacated. Petitioner will now pay the remaining 50 % of the back wages to the respondent workman without any

interest within two months and will also pay full wages from the date of the impugned award till the date of his actual reinstatement within two months from the date of receipt of the copy of this order.

(H.K. Rathod,J.)

Vyas